PREME COURT, U. S.

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1121

CARL RAY HOOD, whose true and correct name is ROY ELTON HAWKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

JAMES CALVIN WARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

MARY DOSS, whose true and correct name is MARY BASE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Tenth Circuit entered on October 29, 1974 in *Carl Ray Hood, et al, vs. United States of America.* (Nos. 74-1089, 74-1090 and 74-1091). Petition for Rehearing was denied on February 6, 1975.

OPINION BELOW

The opinion of the Tenth Circuit affirming judgment of the District Court, filed October 29, 1974, is marked "Not For Routine Publication", and is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 29, 1974. Petition for Rehearing was denied by the Circuit Court on February 6, 1975 (Appendix "B"). Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Supreme Court Rules 22(2).

QUESTIONS PRESENTED

1. Was the defendants' right of due process denied by an agreement of the U. S. Attorney with key witnesses and co-conspirators for lieniency when the witness testified falsely about the promise?

2. Did the lower court erroneously define and expand the scope of conspiracy by upholding the conviction of James Ward and Mary Base?

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, 5th Amendment:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

I. *The Facts*

The three petitioners seeking to come before this Court were among eight persons indicted on March 6, 1973 for conspiring to use the mails and interstate wire communications to defraud, and for conspiring to transport goods valued in excess of $5,000 in interstate commerce. In summary, the alleged conspiracy involved a scheme to buy as many goods on credit without any intent to pay for the goods; and then sell the goods at bargain prices. The plan then was for the person whose credit was being used to go into bankruptcy. In other words, there was a planned bankruptcy.

As the scheme or conspiracy was unfolded through the testimony of two principal government witnesses, it was shown that only three persons were involved. In February, 1972, Troy Sumrall, Carl Hood and John Cash met at the place of business of Mr. Cash. They met to discuss the formation of the F & W Industrial Supply Company, the business shell to be

used in the get rich quick scheme. (*R. 17) The three men talked about forming F & W Industrial Supply to acquire merchandise and to sell it under wholesale price (R. 18).

First, it was decided that an office was needed; therefore, the three men obtained a mobile home and set it up beside and connected to Cash's mobile home business. They then acquired a credit rating from Dun & Bradstreet relying on the established credit of Cash (R. 19). Mr. Cash and Mr. Hood next decided that Troy Sumrall should change his name and it was mutually decided that the new name would be Charles R. Duke (R. 20).

This name change was accomplished by Mr. Cash through a friend working for an oil company. Cash and Sumrall went to Loffland Brothers Petroleum Company, to an old friend of Cash who was told that he (Cash) needed a certificate saying that Charles Duke "had been working in Venezuela for the last four or five years, and (that his) baggage was stolen on the boat in transport back, and (that Duke) didn't have any identification; and (that Duke) needed to acquire a driver's license." The false certificate was then

* References to pages of the trial transcript to be certified to this Court by the Clerk, United States Court of Appeals for the Tenth Circuit.

prepared at the request of Cash. With this name change, the main principals in the alleged conspiracy were John Cash, Charles Duke[1] and Carl Hood[2].

After obtaining the false credentials, Cash and Duke went to the Driver's License Bureau. Cash talked to the patrolman who came out and went to coffee with Cash and Duke (R. 21). Cash told the patrolman that he needed a driver's license for Duke and then showed him the false certificate (R. 21). The patrolman then went back into the office of the Driver's License Bureau and Duke and Cash left. That night the patrolman brought the driver's license made out to Charles R. Duke to the office of Mr. Cash (R. 21-22).

Mr. Cash and Mr. Duke opened a bank account for F & W Industrial Supply (R. 22). These two, along with Carl Hood, then went to a lawyer who was a friend of Mr. Cash and worked out a partnership arrangement which was filed with the Secretary of State (R. 23). Under this agreement, Duke was made the general partner, and Cash was made the "limited partner". The value of Mr. Cash to this scheme was in

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[1] In this petition, the name Duke will be used to describe the activities of Troy Sumrall.

[2] Carl Hood's real name was Roy Elton Hawkins; however, this change took place several years prior to the conspiracy involved in this case. (R. 358).

his credit rating. With the operation about to start, Dun & Bradstreet was requested to update its credit records.

Mr. Cash admitted that he was involved in this scheme and that he planned to build up large credit and then declare bankruptcy (R. 90). He stated that he knew that the scheme was morally wrong but that he was led to believe that there was nothing illegal involved (R. 90). Previously, Mr. Cash was in the mobile home business; however, after F & W started he bought no more mobile homes (R. 99).

Mr. Jerry Butler, Reporting Service Manager of Dun & Bradstreet, Tulsa office, testified that Mr. Cash had requested an update on his credit rating (R. 147). Two reports were prepared — one dated February 29, 1972 and an improved report was dated March 13, 1972 (R. 150). Operation of F & W Industrial Supply then began the latter part of March, 1972 (R. 25). Three employees, hired initially, included Lawrence Cooper, Calvin Ward and Mary Base (R. 26). Cooper and Ward were hired as purchase agents and Mary Base was hired as a secretary. According to the testimony of Mr. Duke, Mary Base did "just mainly secretarial work" (R. 26). To each of these employees, Cash and Duke were introduced as the boss from whom the employees should take orders (R. 75).

From the money made through the F & W operation, Mr. Cash was to receive one-half and the other half was to be divided between Hood and Duke (R. 87). On the other hand, the employees received hourly wages. For example, the secretary, Mary Base, received $2.00 per hour (R. 333).

From all that appears in the record, the employees hired by Hood, Cash and Duke were that — employees. Cooper and Ware were hired as purchasing agents; Lewis was trying to sell some wire for Carl Hood who was his father-in-law (R. 343). Mary Base did start working for F & W under the assumed name of Mary Doss; however, a reasonable answer was given for this which was personal and had nothing to do with any conspiracy (R. 334).

The parade of government witnesses, some thirty-two in all, most of whom were persons bilked by the conspiracy, implicated Cash and Duke in the scheme. Ronald Davis of the Tulsa Paint and Supply Company stated that he called the F & W Company and talked with Lawrence Cooper who referred the call to Mr. Cash (R. 206). Davis then told Cash that he was charging all the material to him upon the strength of his credit rating (R. 206). Cash then advised Davis to send it (R. 206). Thus, some direct connection between supplier and Cash was shown numerous times in the Record (R. 134-135).

After the trial was over and the jury dismissed, Judge Bohanon accurately described the situation as being the "most disgusting, most uncalled for, most evil thing that I can imagine, businessmen getting together and cheating and defrauding people in the way and manner that they have done." (R. 403). But as disgusting as the scheme was with Duke and Cash preparing the operation the final conclusion was equally disgusting.

The government granted immunity to Mr. Duke who had been a key instrument in the conspiracy, and who operated under forged documents (R. 12). Mr. Cash who provided the essential credit and was willing to file bankruptcy and was to receive one-half of all the profits was allowed by the government to file a plea of guilty to one count and was sentenced to a two year probationary term. Thus, the two principle designers of the fraud and conspiracy described as disgusting by Judge Bohanon got off from having to serve a single day in prison.

On the other hand, two of the lowly paid employees were convicted. Calvin Ward, one of the employees, was sentenced to serve three years in prison and to pay a fine of $5,000 (R. 420). And the even lesser Mary Base who did nothing but take a job as secretary was found guilty, and was sentenced to serve two years and to pay a fine of $2,500 (R. 420).

II. *The Trial Court*

On November 2, 1973, the jury returned a guilty verdict against Carl Hood, Calvin Ward, and Mary Base (R. 400). A Motion for a New Trial was heard and denied by the trial judge on January 21, 1974 (R. 405-406). The basis of this motion for a new trial was that the United States Attorney had made a deal with John Cash which was concealed from the jury. After filing a timely Notice of Appeal, an appeal was taken to the Tenth Circuit.

III. *Court of Appeals*

On October 29, 1974, the United States Court of Appeals for the Tenth Circuit affirmed the lower court judgment (Appendix A). And on February 6, 1975, the Tenth Circuit denied the Petition for Rehearing (Appendix B).

REASONS FOR GRANTING THE WRIT

1. *This writ should be granted because the decisions below are inconsistent with decision of this Court that requires a reversal of a conviction when there are concealed promises made to key witnesses.*

The Tenth Circuit cited *Giglio v. United States*, 405 U.S. 150 (1972); however, based on the clear facts in this case, the *Giglio* case was not followed. No consideration was given by the Tenth Circuit to *DeMarco v. United States*, 415 U.S. 449 (1974) even though that

case was decided during the period of appeal. As this Court will be clearly shown, the facts in the present case go much farther than the facts in either *Giglio* or *DeMarco*. In the present case, the two masterminds of the conspiracy, Cash and Duke, were able to carry their plan through the trial and avoid prison. They made a deal with the United States Attorney and ended up offering a sacrificial lamb to appease the Government's desire to get a conviction of somebody. But what has been gained by this powerful arm of Government by convicting an insignificant secretary and insuring the freedom of the principal conspirators? Certainly this cannot be a proud achievement of our system of jurisprudence.

In *Giglio v. United States*, 405 U.S. 150 (1972), Mr. Chief Justice Burger, writing for the Court without dissenting vote, reasoned that due process requirements would not allow a conviction to stand if material evidence about a promise of leniency to a key witness is concealed from the jury. Secret deals between prosecutor and witnesses have no place in our system of criminal jurisdiction. Judge McCree writing for the Sixth Circuit in *United States v. Smith*, 500 F.2d 293 (6th Cir. 1974) stated:

> It is, of course, the duty of the prosecutor to advance the government's cause with force and with persuasiveness. However, this duty includes concerns in addition to mere advocacy.

> To the prosecutor is also entrusted the responsibility of observing in practice the principles considered under our system to be essential to a fair and just criminal procedure. *Id* at 295.

While the prosecutor can "strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). As Mr. Justice Rehnquist observed in *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974): "We countenance no retreat from" the firmly established principle that the due process requirement will not tolerate a "criminal conviction obtained by the knowing use of false evidence." Mr. Justice Blackmun, in *United States v. Ash*, 413 U.S. 300 (1973) fairly described the situations when the right to due process has been violated by the prosecutor. He stated:

> Evidence favorable to the accused may be withheld, testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may, 'strike hard blows' but not 'foul ones.' ... If that safeguard fails, review remains available under due process standards. *Id* at 320.

This Court reemphasized its due process rule of *Giglio v. United States*, when it declared in *DeMarco v. United States*, 415 U.S. 449, 450 (1974) "that a conviction is invalid if the Government permits one of its

witnesses falsely to deny a promise of leniency made in exchange for his testimony." *Teague v. United States*, 499 F.2d 1381 (7th Cir. 1974). In the *DeMarco* case, there involved a proof problem which appeared to disturb the dissenting members of the Court. Mr. Justice Rehnquist stated that *DeMarco* raised only a factual issue and that: "Commonly I would expect this petition to be denied for those reasons." *DeMarco v. United States*, 415 U.S. 449, 451 (1974).

In the *Per Curiam* opinion, it was concluded that "there was a plea bargain between the witness and the Government at some point, the questions being whether it was made after or before petitioner's trial." *Id* at 450. Further that if there "had been a promise to the witness prior to his testimony, *Giglio* ...would require reversal of petitioner's conviction." *Id* at 450. Unlike the *DeMarco* facts, the petitioner in the present case did have a factual hearing on the question but it was concluded that the motion for new trial should be denied because the trial judge was of the opinion that there had been a fair trial (R. 416).

The Tenth Circuit agreed that "if a promise of leniency had been made to Cash in return for his testimony reversal would be required." (Appendix A, p. 6). But then the court observed:

> If on the other hand, no such promise was made or proven the alleged falsity of the testimony would not have been proven. (Appendix A, p. 6).

Continuing, the Tenth Circuit concluded that the proof in this case was inadequate. But it should be observed that the Tenth Circuit required the proof of an explicit agreement between the prosecutor and the witness. It stated:

> To say that an understanding was to be inferred is much less than saying that an understanding existed. (Appendix A, p. 7).

This is a strange and unreasonable conclusion reached by the Tenth Circuit particularly in the present case which involved the proof requirements of a conspiracy. A conspiracy can be established by circumstantial evidence. *Industrial Building Material's Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970). Agreements among co-conspirators need not be express but may be inferred from acts of parties. *Oltman v. Miller*, 407 F.2d 376 (7th Cir. 1969). If a conspiracy can be established by inference, how can the Tenth Circuit insist on proof to show that an agreement between prosecutor and witness actually existed?

Proof of an actual agreement between the witness and the prosecutor misses the entire concept of the issue of due process. An inference can be just as

damaging as an actual agreement as to the credibility of a witness. If from the evidence a reasonable inference can be drawn that a witness was promised leniency, that can distort the testimony of the witness. The jury which must assess the credibility of a witness can accurately do so only if it knows the circumstances of any promise of leniency.

As the Sixth Circuit concluded in *United States v. Smith*, 500 F.2d 293, 297 (6th Cir. 1974), the test is the effect on the jury that must decide the fate of the defendants. Citing and quoting from *Kotteakos v. United States*, 328 U.S. 750, 764-765 (1945), the Sixth Circuit observed that "'if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'"

The Tenth Circuit in the present case has created an almost impossible obstacle to ever prove that there was a promise of benefit by prosecutor to witness. There will be few cases when one can prove that an actual agreement existed. At the most, in order to insure due process, the petitioner should be required only to establish a promise of benefits through a reasonable inference. As this Court noted in *Giglio v. United States*, 405 U.S. 150, 153 fn (1972),

> The Hoey affidavit, standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency.

The Seventh Circuit takes a position inconsistent with the Tenth Circuit as to the requirement of an explicit agreement. *Teague v. United States*, 499 F.2d 1381, 1385 (7th Cir. 1974). In the *Teague* case, the Seventh Circuit stated that whether there was an explicit bargain is not the only issue. *Id* at 1385. A test more in line with the concept of due process was stated by the Seventh Circuit:

> If the evidence shows that some or all of these answers were false, and that the Government had reason to know the answers were false, then the district judge must decide whether 'the false testimony could...in any reasonable likelihood, have affected the judgment of the jury.' *Id* at 1385. (Citing *Giglio v. United States*).

In the present case, the Record is clear that Mr. Cash gave false testimony about his dealings for leniency with the United States Attorney. The Record reflects the following:

> "(Counsel) Now Mr. Cash, you are a listed defendant, not here on trial, is that right?
>
> (Cash) That's true.
>
> Q. Have you been offered anything for your testimony in this trial whatsoever?

A. No, sir.

Q. Has any government agent, whether it be the Assistant or the U. S. District Attorney for this District or any Federal Bureau of Investigation agent or any state agent, offered you anything in return for coming here and telling your story?

A. No one.

Q. No one at all?

A. No one.

Q. No one has discussed what your possible recommendation from their office will be or anything of that nature?

A. No, sir, I have not discussed this with Mr. Graham or any member of his office. We have only had to pass the time of day.

Q. What about Mr. Fallis (State District Attorney) and those people?

A. No, sir.

Q. You can tell this jury that no such conversation or no such offers have been made to you?

A. I have had no conversations with them in that regard. (R. 110-111).

On redirect examination and on recross examination the denial by Cash of any deal made with the United States Attorney was greatly inflated and stressed upon the jury. There was the following redirect examination:

> "(U.S. Attorney) John, you are named as a defendant in this indictment?
>
> (Cash) Yes, sir.
>
> Q. Have you been before the court?
>
> A. Yes, sir.
>
> Q. And entered a plea of guilty?
>
> A. Yes, sir.
>
> Q. Been sentenced?
>
> A. Yes, sir.
>
> Q. What were you sentenced to?
>
> A. Five years.
>
> Q. What is the maximum punishment?
>
> A. Five years. (R. 120).

Following this redirect, the trial court judge addressed itself to the jury and stated that:

> The Court permits these questions and answers for your information, to test the credibility of this witness, since he has plead guilty to this charge. (R. 120).

It could reasonably be assumed that the U.S. Attorney was seeking to create an impression for the jury that Cash had no reason to give false testimony. That he had already entered a plea of guilty and had received the maximum sentence of five years.

What the U.S. Attorney failed to reveal was that there had been three charges filed against Cash and that he had pleaded guilty only to one of the charges. On recross, Cash testified that the other two charges were still pending and that he expected to go to trial on them (R. 124). Cash stated: "I have the notice from the court." (R. 124).

The jury had to be left with the impression that there could not possibly have been a deal since he entered a plea of guilty and still expected to be prosecuted on two other charges. But testimony at the hearing for a motion for new trial would clearly indicate that there was an agreement between Cash and the U.S. Attorney. Testimony was given at this motion hearing by Mr. Curtis Parks, an attorney who had represented John Cash in connection with the conspiracy charges filed against Cash. Regarding the agreement between Cash and the U.S. Attorney, Mr. Parks testified as follows:

> "(Counsel) All right, sir. Now at that point in time, or prior thereto, had you had discussions with Mr. Nat Graham, or any of his assistants, concerning those other indictments against Cash?
>
> (Parks) Yes.
>
> Q. All right, sir. Was there an agreement reached between you, sir, and Mr. Graham's office, on those remaining indictments?

A. Yes.

Q. All right, sir. Was your client made aware of that agreement?

A. Yes.

Q. All right, sir. Please tell the court what that agreement was.

A. Well, the understanding was that we would enter a plea on the 45, which was the conspiracy, and that the other two would be dismissed.

Q. All right, sir. Specifically, Mr. Parks, Mr. Graham on his own motion can't dismiss those, can he?

A. Right. It has to be from Washington.

Q. All right, sir. And Mr. Graham, had he informed you, sir, that he had commenced that process?

A. Yes.

Q. And again, that was prior to the date of the conspiracy trial?

A. Yes. (R. 410-411).

On cross examination conducted by the Assistant U.S. Attorney, the presence of a pre-trial agreement becomes even clearer.

"(Asst. U.S. Attorney) Mr. Parks, just for the record, your client, Cash, first entered a plea on May 24, 1973, did he not?

(Parks) Yes, sir.

Q. And was sentenced to a maximum of ten years on that plea of guilty, under the statute *which provided for a resentence later?* (emphasis added)

A. I think that is right. It was five years, wasn't it?

Q. Anyway it was the maximum?

A. Right.

Q. And was finally re-sentenced to the probationary term December 4, 1973 after the trial before Judge Bohanon in November?

A. I think that's right . . .

Q. Mr. Parks, you didn't state to the court with whom you had this agreement. Counsel has indicated it was the United States Attorney, Mr. Graham, is that right?

A. Yes.

Q. Where did this agreement take place?

A. Well, we discussed it on several occasions. The time I remember the best was in his office.

Q. And can you give the court some idea of when?

A. Oh, it was way back in — before we plead guilty originally back in May.

Q. Was anyone present besides you and Mr. Graham?

A. I don't think so. (R. 411-413).

"Counsel on Redirect) Mr. Parks, specifically, sir, was there an understanding that John Cash would testify in the trial of the other co-conspirators?

A. Yes.

Q. Okay. Was that, sir, the understanding at the time you struck your agreement with Mr. Graham?

A. Well, that was certainly inferred, I mean it was. (R. 413).

The conflict in testimony is between Cash who admitted his active part in the conspiracy, and Cash's own attorney, Mr. Curtis Parks. Certainly there could be no motive for Mr. Parks to testify falsely. As an attorney of law and an officer of the court, Mr. Parks is drilled in judicial and professional ethics. On the other hand, Mr. Cash admitted that he planned his bankruptcy to defraud creditors. His active part was so well demonstrated by his credit dealings and his role in getting for Duke forged documents and a driver's license.

Cash had a clear motive to cooperate with the U.S. Attorney by testifying at the trial so that the Government could get at least one conviction. With the aid of Cash, there were in fact three convictions two of which involved unsuspecting employees. For sure, Cash did plead guilty and did receive the maximum

sentence before the trial. However, this maximum sentence provided for a later resentence after the trial. And after the trial, the sentence of Cash was reduced to a two year probationary term. Can it be doubted that there was an agreement between Cash and the U.S. Attorney?

Except for an agreement for leniency, why would the ring leader of the conspiracy, Cash, receive a probationary term? Mr. Graham, the U.S. Attorney, could have helped clear up the matter; however, he was absent from the hearing for the motion for new trial. The Assistant U. S. Attorney, at the hearing, stated that "it would appear to me that Mr. Graham is a necessary witness if the court wants to hear him." (R. 416). Instead of insisting on the appearance of Mr. Graham, the trial court stated:

> Well, he, too, is not here and the court can't wait around when lawyers are not here and they are supposed to be here to take care of their business. That's all there is to it. (R. 416).

The motion for a new trial was then overruled (R. 416).

Even though Mr. Graham did not show up at the hearing for the new trial, the Record would tend to support the existence of an agreement that Cash falsely denied. In spite of all the incriminating evidence against Cash, the U.S. Attorney attempted to convey to the jury a picture of Cash as a person who had

committed a moral wrong only because he was misled by others (R. 121). On redirect examination of Cash, there followed:

> "(Mr. Graham, U.S. Attorney). You testified on cross examination originally you thought this was legally correct but morally wrong.
>
> (Cash) Yes, sir.
>
> Q. You later found out different, is that correct?
>
> A. That's right.
>
> Q. You executed and caused to be executed Defendants' Exhibit No. 1 on May 6th, is that right?
>
> A. Yes, sir.
>
> Q. Is that when you discovered that you were wrong, *that you had been misled?* (emphasis added)
>
> (Objection of defendants sustained)
>
> A. When did you discover that you were wrong?
>
> (Objection of defendants sustained). (R. 121).

If it is not already clear that Cash testified for the Government under a promise of leniency or at the very least under an understanding that the resentencing would bring probation, such becomes indisputable when considered in light of the activities of the U. S. Attorney in relationship to the testimony of

Charles Duke who was Cash's co-conspirator. It is impossible to understand the thinking of Mr. Graham, the U. S. Attorney prosecuting this case. In his zeal to get a conviction, any conviction, he made it impossible for any of the defendants to get a fair trial.

Mr. Graham did succeed in getting three convictions, but two of the convicted were insignificant employees neither of whom had any financial stake in the rewards of the conspiracy. One of the convicted was a $2.00 per hour secretary who worked only for a five week period. For this great "victory" that will destroy all faith in the criminal justice process, Mr. Graham let off scott free the two persons who conceived the conspiracy and who were to receive three-fourths of the illegal profits.

It was Cash who provided the credit line without which the scheme would have failed. It was Cash that had a friend who would prepare false documents to create a new identity for his co-conspirator, Duke. It was Cash who influenced an Oklahoma Driver's License Bureau employee, James Sweeden, to violate his official duty by issuing a driver's license to Duke (R. 224). Because of the way this license was handled, Mr. Sweeden lost his job following an official investigation (R. 221-222). It was Cash and Duke who entered into a partnership arrangement under the name of F & W Industrial Supply. It was Cash and Duke

who were recognized as the "boss" of the employees. And it Cash and Duke who swindled so many creditors.

With all of this involvement by Cash and Duke, the U. S. Attorney would seek to describe Mr. Cash as a person misled by others (R. 121). This is ridiculous and should have drawn the strongest rebuke from the trial court which heard all the evidence and the Tenth Circuit that had the entire Record for review. The deceiving activities and testimony surrounding Cash is also present with the testimony of Duke.

Duke, as the Record clearly reveals, was a very cooperative witness for the Government often times volunteering evidence beyond the questions of the U. S. Attorney, but becoming a reluctant witness during cross examination by the defense (R. 11-84). Before the trial, Duke had cooperated fully with the officials. He gave detailed statements to the grand jury, the F.B.I. and the District Attorney for Tulsa County (R. 38). Mr. Duke had already fully incriminated himself, however, when he was called to testify at the trial, Duke created for the jury an impression that he was reluctant to testify.

Duke refused to answer any questions on the ground that his answers might incriminate him (R. 11). In *United States v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974), the court stated that the "government is not entitled to call a witness when it is clear that the witness will claim his privilege." In this case, however,

the claim of privilege appeared more like a big production for the jury. Once the co-conspirator witness had claimed the privilege, the U.S. Attorney produced a letter from Henry Peterson, Assistant Attorney General of the United States, which authorized immunity for Duke (R. 12). To this theatrical production, the defendants objected; however, the court was of the opinion that it had no discretion in the matter (R. 12-13).

The jury was then informed that Duke had been granted immunity. What appeared to the jury to be a reluctant witness would now have no reason to testify falsely. But what the jury was not told was that Duke had already incriminated himself before the trial ever started with the statements given to Federal and State law enforcement officials. It was not until after Duke's direct testimony that the presence of the statements became known to the jury.

Before starting cross examination, the defense requested a copy of any statement made by Duke (R. 38). The U. S. Attorney, however, resisted this request on the ground that the defense attorney making the request did not represent Duke (R. 38). Even though the court ordered the U. S. Attorney to give the defense attorney copies of the statements, there was still a great reluctance that, out of the presence of the jury, drew an admonishment by the court.

> (The Court) Now Mr. Graham, the court told you day before yesterday that every document that you had in the way of any evidence that would help these defendants, you should give to them; and if you don't give it to them, I am going to dismiss your lawsuit. You understand?
>
> (Mr. Graham) Your Honor please...
>
> (The Court) (Interposing) Don't argue with the court. This is something that you must do. These people are entitled to a fair trial, and a fair trial is that they know what your exhibits are and what your statements are and what all you've got against them, and if you've got any evidence that helps them in their defense, you must let them have it. If you don't intend to do so, why just say so and let's dismiss the lawsuit (R. 40-41).

An explanation for the reluctance to let the defense see the statements given by Cash was offered to the court by the attorney representing Duke. This attorney, Mr. Shofner, stated:

> At the pretrial conference it was agreed for my benefit and my client's benefit that the statements would not be furnished until a later date (R. 41).

The Record is not clear as to the benefits referred to by Cash's attorney; however, this could have been the time used to insure that the Atorney General's office would be willing to grant immunity to Duke.

Duke and Cash, the two men who put together the machinery to defraud creditors, appeared to have

successfully carried their conspiracy into the criminal justice process. With their skill at getting a state official to issue a driver's license; and the skill at getting Dun & Bradstreet to give Cash an improved credit rating; Cash and Duke succeeded in their last effort to avoid prosecution. Duke got immunity and Cash received a two year probationary term. And the three convictions obtained by the Government were not worth the taint placed on our criminal justice process.

This Court should therefore grant this writ in order to prevent departures from the principles expressed in *Giglio v. United States, supra;* and *DeMarco v. United States, supra.*

2. *This writ should be granted because the convictions of James Ward and Mary Base unreasonably expands the already pervasive and wide sweeping nets of conspiracy prosecutions.*

Grunewald v. United States, 353 U.S. 391 (1957) discourages an over expansive use by the Government of conspiracy prosecutions. In this case, it was decided that "after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." *Id* at 401-402. It was further stated that:

> A vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime. *Id* at 405. (emphasis belongs to court).

In the present case, the Government obtained indictments against almost every person who came in contact with the F & W Industrial Supply Company. The *main* criminal objectives of the conspiracy was put together by Cash, Duke and Hood. None of the subsequently hired employees took any part in the scheme. Nothing in the Record would indicate that any of these employees ever took part in any act connected with the conspiracy. Nevertheless, at the very outset, the employees might have suspected that something was wrong. If they did exercise poor judgment it was in not going to the authorities with their information. But less this reporting might incriminate them, these employees had a constitutional right to remain silent.

One thing certain in the present case, the pervasive Government action taken against every unsuspecting employee of F & W will surely discourage others from coming forward in the future. The trouble with the Government's case in the present situation is that the U.S. Attorney granted immunity to one of the *main* conspirators and a probationary term to the second. After

these deals, the Government was left with nobody except these employees, against whom to gain a conviction.

Mary Base was nothing more than a hired secretary who was being paid only $2.00 per hour (R. 333). She testified that she had no knowledge of the Cash-Duke-Hood conspiracy to defraud competitors by taking bankruptcy (R. 334). She testified that she answered the telephone and typed orders that were given to her (R. 335). She further testified that she never kept any of the books for F & W (R. 337). She worked for F & W for only five weeks (R. 335) and quit "because Mr. Cash was drinking and he was, became to be a problem, and I didn't like the way he was acting." (R. 334).

Excluding her own testimony (R. 333-342, attached hereto as Appendix C), there would not be enough testimony about Mary Base to fill two pages of the transcript. Duke testified that Mary Base was a secretary and did "just mainly secretarial work." (R. 26). Duke did say that Mary Base was present in the office when they had meetings (R. 31); but that she was "just present" and did nothing (R. 33).

After the jury returned its three guilty verdicts, the trial judge stated: "I don't know how much this lady (Mary Base) has to do with it...." (R. 404).

Nevertheless, the trial judge refused to dismiss the case against her. This same uncertainty was expressed by the Tenth Circuit when that court remarked:

> Mary Base was not a leader in the scheme. The government's case against her was that she used an assumed name; that she was related to Hood, the principal operator of the scheme; that she placed one order for goods; and that she participated in some meetings. Apart from these facts, *she had had extensive exposure and opportunity to become aware of the scheme.* She testified, and the jury was given full opportunity to judge her credibility and to draw the inference of knowing or, *on the other hand, unknowing participation. This in our view is adequate, although not overwhelming.* (Appendix A, p. 3) (emphasis added).

What the Tenth Circuit is saying here is that Mary Base's "unknowing participation" is enough to support her conviction. If this is allowed to stand, there will be no limits to conspiracy prosecutions. Before a person is safe to take a job, he or she will be required to conduct an investigation of the criminal propensities of the prospective employers. When management of a company enters into a price fixing conspiracy, every employee of the company will become exposed to criminal prosecution. It will be left up to the U. S. Attorney who can grant immunity and leniency to the company management and tack the crime on helpless employees.

If the Government wants to give away its case against the main conspirators by granting immunity and agreeing to probationary terms, the Government must live with it. Courts should reject subsequent efforts of the Government to resurrect the case against persons who might have been exposed to the scheme. Yet this is what the Tenth Circuit did when it affirmed the conviction of Mary Base for the stated reason that "she had had extensive exposure and opportunity to become aware of the scheme. As the court observed in *Anheuser Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961): "Potentiality to commit an act cannot be used as a substitute for proof of the act itself. While it has been said that every person has a little larceny in his heart, not even a cynic would attempt to procure a conviction on that ground alone." Also, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

A glance at the Tenth Circuit opinion will indicate the precarious position that the court places employees of a company. If an employee has been exposed or even had an opportunity to become aware of the scheme, he can be charged as a participant in the conspiracy. The Tenth Circuit would support the conspiracy conviction even if there were only an "unknowing participation." As a matter of law, this is an erroneous and dangerous extension of conspiracy. The Tenth Circuit

has rejected such a casual treatment of conspiracy in civil antitrust suits. *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), cert. denied 396 U.S. 901 (1972). It would be strange to require more proof of a conspiracy in a civil antitrust case than would be required in a criminal case.

In the present case, the Tenth Circuit's opinion is on its face inconsistent and must as a matter of law be rejected. For establishing the conspiracy, the court noted that the jury could draw an "inference of knowing" (Appendix A, p. 3); however, the court refused to accept an inference that Cash had been granted a promise by the U. S. Attorney. The court stated: "To say that an understanding was to be inferred is much less than saying that an understanding existed." (Appendix A, p. 7).

This is the type situation when this Court must extend its "supervisory power over the administration of federal criminal justice in order to rule on the matter." *Grunewald v. United States*, 353 U.S. 391, 424 (1957). A cruel injustice has been committed upon our system of criminal procedure that is designed to reach the guilty and clear the innocent. Whether "by accident or by design", the U. S. Attorney improperly subverted the trial in the present case. *United States v. Ash, supra* at 320.

CONCLUSION

For all of the above reasons, this writ should be granted and the judgment below should be reversed. The conviction of Carl Hood should be reversed for the reason that Cash falsely testified about a promise of leniency from the U. S. Attorney. The convictions of James Calvin Ward and Mary Base should be reversed for the reason of Cash's promise of leniency and for the additional reason stated in the second ground for requesting certiorari.

Respectfully Submitted,

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